

BEFORE THE  
POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF  
BURLINGTON NORTHERN RAILROAD,

Appellant,

v.

PUGET SOUND AIR POLLUTION  
CONTROL AGENCY,

Respondent.

PCHB No. 85-74

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND  
ORDER

THIS MATTER, the appeal of a notice and order of civil penalty and associated \$500 penalty for violation of respondent agency's Regulation I, Section 9.15(a) for allowing particulate matter to be emitted during the transfer of grain from a derailed railroad car to a railroad car on the track, came on for hearing before the Board; Wick Dufford and Lawrence J. Faulk (presiding) on September 19, 1985, at Seattle. Respondent elected a formal hearing pursuant to RCW 43.21B.230 and WAC 371-08-155.

Appellant Burlington Northern, was represented by Attorney at Law,

1 Lawrence D. Silvernale. Respondent Agency was represented by its  
2 attorney, Keith D. McGoffin.

3 Witnesses were sworn and testified. Exhibits were admitted and  
4 examined. Oral argument was heard. From the testimony, evidence, and  
5 contentions of the parties, the Board makes these

6 FINDINGS OF FACT

7 I

8 Respondent, Puget Sound Air Pollution Control Agency (PSAPCA), has  
9 filed with the Board a copy of its Regulations I and II, and all  
10 amendments thereto which is noticed.

11 II

12 On the afternoon of March 11, 1985, at approximately 2:07 p.m., an  
13 inspector for respondent while on routine patrol in the Tacoma Tide  
14 Flats observed a whitish/tan dust emission coming from a railroad car  
15 loading operation. The inspector observed the operation from 2:10  
16 p.m. to 2:32 p.m.. The skies were clear and the temperature was  
17 approximately 50 degrees.

18 The inspector observed two men cleaning up a grain spill (corn)  
19 from the Burlington Northern Railroad tracks using a pneumatic pump  
20 and filling one of two railroad cars parked adjacent to Dock Street.  
21 The whitish/tan plume was continuous for a total of 14 minutes in a 25  
22 minute period.

23 III

24 The northernmost of the two cars was being filled with the spilled  
25 grain. Dust was emanating from the southernmost hatch and the hatch

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1 next to it. The inspector observed a pneumatic tube which entered the  
2 southernmost hatch. The other hatch was held open by a block or  
3 stick. There was no attempt to control emissions from these openings.

4 The inspector contacted Mr. Jonas Simonis, Terminal Manager for  
5 Burlington Northern Railroad, at the grain loading site. Mr. Simonis  
6 stated that MacMillan-Piper, Inc. was hired to clean up a grain spill  
7 from a railroad car that had derailed

8 The inspector then contacted Mr. Paul Nelson, foreman for  
9 MacMillan Piper and advised him regarding the excessive dust emissions  
10 from the rail car. Mr. Nelson stated a cyclone is normally installed  
11 on the hatch of the railroad car to cut down on the dust, but on such  
12 short notice, they could not get a cyclone for this job. He also  
13 stated that the dust emission leaks were caused by bad seals and a  
14 missing gasket.

15 Mr. Nelson and Mr. Simonis were informed that a violation of  
16 PSAPCA Regulation I, Section 9.15(a) had occurred and a Notice of  
17 Violation would be issued.

#### 18 IV

19 MacMillan-Piper performs transloading and cleanup services under  
20 terms of a verbal annual contract with Burlington Northern Railroad in  
21 situations such as the derailment incident under consideration.

22 Burlington Railroad owns the land, the tracks and railroad cars  
23 involved here, but does not possess the equipment needed for cleaning  
24 up this type of accident. That's why Burlington Northern hires  
25 MacMillan-Piper.

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1 MacMillan-Piper is expected to comply with applicable emissio  
2 control requirements in providing the services it contracts to provide.  
3 It appears from this record that some of the equipment required for  
4 dust control at the site was missing. We find that the responsibility  
5 for providing this equipment in good working order was on  
6 MacMillan-Piper.

7 V

8 There is no evidence that Burlington Northern Railroad had any  
9 authority over the actions of MacMillan-Piper employees at the site.  
10 The railroad neither hired them nor had the power to fire them.  
11 Burlington Northern, in fact, made no effort to supervise the  
12 transloading operation.

13 VI

14 The railroad and MacMillan-Piper learned of the incident and  
15 intent to issue a notice of violation from telephone calls made by  
16 respondent's inspector on March 11, 1985. Notice of Violation No.  
17 20249 was issued them jointly on that day.

18 VII

19 Notice and Order of Civil Penalty No. 6263 for \$500 was issued by  
20 PSAPCA on April 24, 1985, to both companies. From this, Burlington  
21 Northern alone appealed to the Board on May 10, 1985.

22 VIII

23 The events here represent the first time that Burlington Northern  
24 has been fined by PSAPCA for an emission of grain dust.

IX

There is no evidence that the event in question directly caused injury to human health, plants, animal life or property, or unreasonably interfered with the enjoyment of life and property. However, this site is located in a federally designated nonattainment area for total suspended particulate matter. This means the national ambient air quality standard for such material (promulgated by the U.S. Environmental Protection Agency) has not been attained and maintained in the area. The standard was established at a level selected for the protection of public health. Accordingly, any significant addition of particulate to the ambient air in the area has the potential for detriment to health, property or enjoyment.

Appellant did not controvert the facts evidenced by the PSAPCA inspector's observations in any instance.

X

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such.

From these Findings of Fact the Board comes to these

CONCLUSIONS OF LAW

I

The Board has jurisdiction over these persons and these matters. Chapters 43.21B and 70.94 RCW.

II

Section 9.15 of PSAPCA's Regulation I reads, in pertinent part, as follows:

FINAL FINDINGS OF FACT,  
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(a) particulate matter to be handled, transported or sorted . . . in such a manner that particulate matter is emitted in sufficient quantities and of such characteristics and duration as is, or is likely to be, injurious to human health, plant or animal life, or property, or which unreasonably interferes with enjoyment of life and property. (Emphasis added.)

III

Burlington Northern does not argue that no violation occurred. Its case is based on the assertion that it should not be held legally responsible. We agree.

## IV

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1 independent contractor does not always automatically follow. See  
2 Jackson v. Standard Oil of California, 8 Wn.App. 83, 505 P.2d 139  
3 (1972).

4 V

5 The escape of particulate matter in certain localities, such as  
6 here, exacerbates a non-attainment problem for legislatively mandated  
7 particulate standards. The exceedance of these standards is injurious  
8 to public health and welfare. PSAPCA Regulation I, Section 9.15(a) is  
9 a rule imposing an absolute duty to provide safeguards for the safety  
10 of others.

11 Under the circumstances of this case, however, we conclude that  
12 Section 9.15(a) places this duty on MacMillan-Piper, not on Burlington  
13 Northern.

14 The material transported here (corn) is not inherently dangerous  
15 nor associated with unusually high air pollution risk. Here the harm  
16 does not consist in the identified injury of any person. The problem  
17 is, rather, a civil wrong against the public at large. The policy  
18 purpose of spreading the loss to reach an entity in Burlington  
19 Northern's position is not present when it has not set in motion  
20 forces involving a high degree of risk and when liability has no  
21 compensatory effect. Compare American Transport v. PSAPCA, PCHB  
22 84-266 (June 12, 1985) with Continental Grain v. PSAPCA, PCHB 85-78  
23 (October 14, 1985) and Rande Kummer v. SCAPCA, PCHB 84-249 (October  
24 17, 1985).

25 Accordingly, we reverse the imposition of the penalty in question

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1 on Burlington Northern Railroad.

2 VI

3 Any Finding of Fact which is deemed a Conclusion of Law is hereby  
4 adopted as such.

5 From these Conclusions the Board enters this  
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ORDER

The assessment made against Burlington Northern Railroad by Notice and Order of Civil Penalty No. 6263 issued by PSAPCA in the amount of \$500 is reversed.

DONE this 24th day of October, 1985.

POLLUTION CONTROL HEARINGS BOARD

 10/24/85  
\_\_\_\_\_  
LAWRENCE J. FAULK, Chairman

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WICK DUFFORD, Lawyer Member